

**United States Department of Labor
Employees' Compensation Appeals Board**

T.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Smithtown, NY, Employer**

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**Docket No. 16-1509
Issued: April 3, 2017**

Appearances:

Thomas S. Harkins, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 19, 2016 appellant, through counsel, filed a timely appeal from a March 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits and medical effective June 9, 2015.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 26, 2012 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a right shoulder injury due to feeling a sharp “pop” in his shoulder after picking up his shoulder bag. Appellant stopped work on the date of injury and returned to work with restrictions on August 14, 2012. By decision dated September 17, 2012, OWCP accepted appellant’s claim for a sprain of the right rotator cuff. On February 28, 2013 it accepted a claim of recurrence of appellant’s condition based on a surgical procedure to treat the accepted condition on February 8, 2013. He received wage-loss compensation.

On June 20, 2013 OWCP referred appellant for a second opinion examination with Dr. Leon Sultan, a Board-certified orthopedic surgeon, in order to determine whether the work-related injury had resolved and whether he continued to be disabled from employment.

In a report dated July 18, 2013, Dr. Sultan opined that appellant’s right shoulder condition had not yet fully resolved. He noted that appellant was not yet ready to return to full unrestricted work activity as a letter carrier, but that he could return to work with restrictions.

On August 7, 2013 appellant accepted a modified city carrier position with physical restrictions.

On September 26, 2013 OWCP instructed appellant to attend a follow-up appointment with Dr. Sultan to determine whether his work-related injury had resolved and whether he was capable of working full duty at his preinjury position. It sent Dr. Sultan a statement of accepted facts (SOAF), which noted that appellant had returned to work with restrictions on August 12, 2013. OWCP noted that appellant was bitten by a dog during delivery on August 16, 2013, which was pending review under File No. xxxxxx590. Appellant returned to work full time with a 15-pound weight bearing restriction on September 10, 2013.

In a report dated October 8, 2013, Dr. Sultan examined appellant and noted that appellant’s orthopedic examination in regard to his right shoulder revealed well-healed surgical scars with intact shoulder motion without any clinical signs of impairment or instability. He noted that appellant was unable to confirm any residual right shoulder or right upper arm muscle atrophy. Dr. Sultan concluded that appellant’s right shoulder condition was clinically resolved and he was capable of returning to regular work activity without restrictions.

In a note dated October 16, 2013, Dr. Sandra J. Iannotti, a Board-certified orthopedic surgeon, noted that appellant should continue to work light duty with no lifting greater than 15 pounds, and that he should also continue with these restrictions for three months until he was a full year post operation. She noted that on examination he had elevation to 170 degrees, good internal and external rotation, but was still sore past 140 degrees and weak on testing.

On January 30, 2014 Dr. Iannotti reported that appellant should continue with restrictions of no lifting greater than 15 pounds, because he should not reach repetitively behind himself to grab mail. She noted that this motion would irritate the repair, so that this restriction should be permanent. On examination Dr. Iannotti noted that appellant’s range of motion was still not full, but improved to 175 degrees of motion with less soreness.

In a note dated February 26, 2014, Dr. Iannotti reported that appellant could return to work full time, at full duty, with the exception of a permanent restriction of no carrying more than 15 pounds on a regular basis or 35 pounds on an intermittent basis. On examination she noted elevation at 175 degrees with slightly more stiffness than her prior examination.

On April 23, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that the weight of the medical evidence established that he no longer had continuing residuals of his accepted work-related condition. It based its proposed termination on Dr. Sultan's October 8, 2013 report, noting that appellant had not submitted any contemporaneous medical reports on the issue of continued residuals that were legibly signed by a physician. OWCP further noted that even if the unsigned reports were from physicians, they were not sufficiently well reasoned. It held the case record open for 30 days for the submission of additional evidence.

In an addendum report dated April 29, 2014, Dr. Sultan opined that there were no additional conditions related to appellant's right shoulder or rotator cuff that should be accepted by OWCP.

By decision dated June 4, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 2, 2014, based upon Dr. Sultan's October 8, 2013 and April 29, 2014 reports.

In a note dated June 5, 2014, Dr. Iannotti reported that appellant's work restrictions should continue and that he should be allowed to take off one to two days from work when his postoperative shoulder injury was aggravated.

On June 3, 2015 appellant, through counsel, requested reconsideration of OWCP's June 4, 2014 termination decision. Counsel argued that the decision should be vacated because he had not been sent a copy of the notice of proposed termination. He further argued that there was an unresolved conflict of medical opinion between appellant's treating physician and Dr. Sultan.

By decision dated June 9, 2015, OWCP vacated its prior termination decision dated June 4, 2014. It noted that it had failed to provide counsel of record with a copy of the notice of proposed termination. On the same day OWCP issued an updated termination decision superseding its prior decision and terminating appellant's wage-loss compensation and medical benefits effective June 9, 2015. Counsel for appellant was not served a copy of the June 9, 2015 revised decision.

In a note dated June 1, 2015, Dr. Iannotti diagnosed status post large full-thickness rotator cuff repair in a very active job. She noted that he had reached maximum medical improvement (MMI) with some stiffness, and rendered a percentage of permanent impairment. On examination Dr. Iannotti noted that appellant had 165 degrees of forward elevation compared to 180 degrees on the left, extension of 30 degrees compared to 50 degrees on the left, abduction of 120 degrees compared to 180 degrees, adduction of 40 degrees compared to 50 degrees, external rotation at 90 was 45 degrees compared to 90 degrees, and internal rotation at 90 was 20

degrees compared to 90 degrees. She also noted that appellant had reasonably slightly-decreased strength to rotator cuff testing.

In a narrative report dated June 5, 2015, Dr. Iannotti reviewed appellant's case history and rendered a rating of permanent impairment. She noted that appellant's accepted condition was permanent and had reached MMI. Dr. Iannotti explained that appellant had some residual loss of motion and residual weakness. Appellant was at risk for aggravating his symptoms with overuse and at a high risk for a re-tear as his repaired cuff is not as strong as a normal rotator cuff would be. Dr. Iannotti also related that he continued working full duty with a permanent restriction of no carrying greater than 15 pounds on a regular basis and 35 pounds on an intermittent basis.

On December 9, 2015 appellant, through counsel, requested reconsideration. Counsel argued that OWCP failed to resolve a conflict in medical opinion between Dr. Iannotti and Dr. Sultan and that OWCP had failed to follow proper procedure by issuing a notice of proposed termination before issuing its June 9, 2015 decision.

By decision dated March 8, 2016, OWCP reviewed the merits of appellant's claim and affirmed its June 9, 2015 decision. It noted that "permanent impairment ratings are not the issue, but rather partial disability which [Dr. Iannotti] does not reasonably explain in her report."

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

OWCP procedures indicate that a pretermination is not required if a claimant has returned to work and has received compensation payments for less than one year.⁶ The procedures indicate that a notice is required if medical benefits are terminated based upon the opinion of a second opinion or referee examiner, as opposed to the treating physician.⁷

³ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369, 369 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1440.4.a(2), (3) (February 2013); see *D.D.*, Docket No. 13-1940 (issued August 4, 2014).

⁷ *Id.* at Chapter 2.1440.4.b(2) (February 2013).

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits.

In his December 9, 2015 request for reconsideration, counsel argued that he was not properly served by OWCP with a pretermination notice despite his representation of appellant at that time. Appellant's termination of medical benefits was based on the second opinion report of Dr. Sultan. As such, a pretermination notice was required to terminate his medical benefits.⁸

While OWCP vacated the June 4, 2014 termination decision on June 9, 2015 because it had failed to provide appellant's counsel with a copy of the notice of proposed termination, OWCP then, on that same day, again terminated appellant's compensation benefits without a pretermination notice.⁹ Counsel has therefore never been provided a pretermination notice in this case.

As OWCP did not send a pretermination notice to counsel prior to its June 9, 2015 decision, OWCP did not meet its burden of proof to terminate appellant's compensation benefits, and the termination of compensation benefits is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 9, 2015.

⁸ *Id.*

⁹ *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2016 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion of the Board.

Issued: April 3, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board